SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 12-E

SPONSOR: Senator Webster

SUBJECT: Governor's Authority to Issue One-Time Stay

DATE: October 20, 2003 REVISED: 10/21/03

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews/Harkey	Kassack	RC	Fav/1 amendment
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill gives the Governor the authority to issue a one-time stay on the action of withholding or withdrawal of nutrition and hydration from a patient in a situation where certain specified conditions applied as of October 15, 2003.

The Governor's authority to issue such a stay will expire 15 days after the effective date of the bill. This expiration does not impact the validity or the effect of any existing stay, and the Governor retains the authority to lift the stay at any time.

The bill provides that a person may not be held civilly liable or be subject to regulatory or disciplinary sanctions for taking actions to comply with any stay issued by the Governor pursuant to this bill.

This bill creates an unnumbered section of law.

II. Present Situation:

The extent to which a health care surrogate or proxy should have authority to make end-of-life decisions when there is no written health care advance directive and family members controvert the end-of-life decision is at the center of a highly publicized and extensively litigated case. *See In re Guardianship of Schiavo*, 851 So.2d 182 (Fla. 2nd DCA 2003), *rev. den*.[1] The case involves the withholding or withdrawal of sustenance and hydration from a woman, Terri Schiavo, who,

[1] *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 780 So.2d 176 (Fla. 2d DCA 2001) (Schiavo I); *Schindler v. Schiavo (In re Guardianship of Schiavo),* 792 So.2d 551 (Fla. 2d DCA 2001) (Schiavo II); *Schindler v. Schiavo (In re Guardianship of Schiavo*), 800 So.2d 640 (Fla. 2d DCA 2001) (Schiavo III).

after suffering a heart attack at the age of 27 in 1990, is in a persistent vegetative state. A medical malpractice lawsuit resulted in a $1 million settlement in 1993. Five years later, her spouse, Michael Schiavo petitioned the court to determine whether his wife's feeding tube should be removed. That petition initiated a multi-year and ongoing legal battle between Michael Schiavo and Terri Schiavo's parents, the Schindlers.

Under the provisions of existing law, Mr. Schiavo is recognized as the legal guardian. However, since the parents objected to the petition for withdrawal or withholding of sustenance, the court is required to step in to review the decision and act as the surrogate decision-maker. As provided by law when there is controversy or disagreement over a health care decision, a family member, health care facility, physician or other interested person affected by the decision can petition for judicial review. *See* s. 765.105, F.S. Mr. Schiavo has sought consent to withdrawal of sustenance and hydration on the basis that this is what his wife would have wanted. The Schindlers, on the other hand, are opposed. Since Ms. Schiavo never executed a written document expressing her desire for end-of-life care, one of the primary focuses of the debate has been whether there was clear and convincing evidence of what Ms. Schiavo would have wanted to do in her state.

In August, 2003, the Florida Supreme Court denied a review of the appellate court's decision to affirm the trial court's decision to order the withholding or withdrawal of sustenance and hydration. On October 10, 2003, a federal court dismissed the Schindler's action in which they challenged the constitutionality of Florida's laws on life-prolonging procedures. Consequently, a trial court order issued an order that requires the withholding or withdrawal of sustenance and hydration from Terri Schiavo which has been in effect since October 15, 2003.

As a result of this latest round of unsuccessful appeals for the Schindlers, the Schindlers propose changes to the laws relating to the authority of health care surrogates and proxies to consent to the withdrawal or withholding of life-prolonging decisions. More immediately, the Schindlers seek to reinstate sustenance and hydration to their daughter. This narrowly tailored bill represents a short-term alternative.

III. Effect of Proposed Changes:

The bill gives the Governor the authority to issue a one-time stay on the action of withholding nutrition and hydration from a patient in a situation where the following conditions applied as of October 15, 2003:

1. The patient has no written advance directive;
2. The court has determined that the patient is in a persistent vegetative state;
3. The patient has had nutrition and hydration withheld; and
4. Any family member has challenged the withholding of nutrition and hydration.

The Governor's authority to issue such a stay shall expire 15 days after the effective date of the bill. This expiration does not impact the validity or the effect of any existing stay, and the Governor retains the authority to lift the stay at any time.

The bill provides that a person may not be held civilly liable or subject to regulatory or disciplinary sanctions for taking actions to comply with any stay issued by the Governor pursuant to this bill.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

- This bill implicates the right of privacy under section 23 of article I of the *Florida Constitution*. This constitutionally protected right of privacy encompasses the right to make health care decisions including the right to choose or refuse life-prolonging procedures.[2] In long-standing recognition of this right, the Florida Legislature has expressly found that this right is not lost or diminished by later physical or mental incapacity.[3] The most recent major revision of laws[4] governing end-of-life matters reflect an extensive statutory framework with options including that of "substituted judgment"[5], a few of which follow[6]:

  Health care advance directives—Such directives may be made in advance through oral statements made to others or through a living will or other written directive that expresses the person's wishes. See Part III, ch. 765, F.S.

  Health care surrogate—This is another form of health care advance directive allows a person to designate a health care surrogate to act on his or behalf. The designation

[2] *See In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990); *see also* art. I, s. 23, Florida Constitution (right of privacy.)
[3] *See* s. 765.102, F.S.
[4] See ch. 99-331, Laws of Florida, and ch. 2000-295The Panel for the Study of End-of-Life Care studied end-of-life topics including pain management, advance directives, and fiscal and regulatory barriers to good end-of-life care. Many changes reflected the continuing effort to more accurately reflect the current medical care practices, trends and case law
[5] Through the concept of "substituted judgment," a person can act on behalf of another person who lacks capacity to make such health care decisions, including consent to withhold or withdraw extraordinary life-sustaining measures on the belief that the terminally ill and incapacitated patient, while competent, would have wanted or done the same under the circumstances. *See John F. Kennedy Hosp. v. Bludworth*, 452 So.2d 921 (Fla. 1984).
[6] In addition, such authority may be conferred upon a *court-appointed guardian* on behalf of an incapacitated person (or ward) if there is no previously executive directive or no surrogate was previously designated. See s. 744.3215(3), F.S. The full extent of the guardian's authority regarding decisions to direct, withdraw or withhold life-prolonging procedures are governed by chapter 765, F.S. See ss. 765.401 and 765.404. There is also authority that may conferred through *a durable power of attorney* which may include the power to make health care decisions, if such authority is specifically granted in the durable power of attorney, including those decisions set forth in chapter 765, F.S., relating to health care advance directives. See s. 709.08(7)(c), F.S.

must be in writing and witnessed by two adults and signed by the principal, or alternatively, another person to sign on the principal's behalf if the principal is unable sign the instrument. See Part II, ch. 765, F.S.

Proxy—If there is no advance directive or designated or available health care surrogate, a proxy may be selected from a list of specified persons in the order of priority as follows:

- A previously court-appointed guardian,
- Patient's spouse,
- Adult child or majority of adult children of parent,
- Parent of the patient,
- Adult sibling or majority of adult sibling of patient,
- Adult relative with knowledge and prior care and concern of patient,
- Close friend of the patient, and
- Social worker. (See s.765.401, F.S.)

A proxy must comply with the same provisions that a health care surrogate must. However, the proxy's health care decisions must either be supported by a written declaration evidencing the patient's desire for such an action, or if there is no written declaration, that it is in the patient's best interest. When authorizing the withholding or withdrawing of life-prolong procedures, a proxy's decision must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent.

Special provisions exist for persons in a persistent vegetative state. If the proxy is a judicially appointed guardian who is not a family or friend, the guardian and the attending physician in consultation with the medical ethics committee of the facility where the patient is located must conclude the condition is permanent, and that there is no reasonable medical probability of recovery.

- This bill implicates due process under s. 9 of article 1 of the Florida Constitution as it does not provide notice or opportunity to be heard or any other procedural process. Additionally, it does not provide conditions for dissolving, lifting, modifying or appealing a stay other than the Governor's sole authority to lift the stay.

- This bill implicates separation of powers as it contains provisions that arguably invade the purview of the judicial branch. *See* art. II, s. 3, Fla. Const. Currently, the Governor has no present constitutional or statutory authority to issue a stay on actions relating to the withholding or withdrawal of sustenance or hydration. Such authority would in effect give the Governor the authority, albeit for a limited time, to override the effect of any court order relating to this matter.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Rules and Calendar:
Removes the condition precedent for allowing the Governor authority to lift a one-time stay such that it is clarified that no reason or circumstance must exist or be found for the Governor to lift the stay he or she has ordered. (WITH TITLE AMENDMENT)